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Jane S. Schacter

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THE OTHER SAME-SEX MARRIAGE DEBATE

JANE S. SCHACTER*

INTRODUCTION

Over the course of his distinguished career, Jeff Sherman has not only made terrific contributions to the study of sexual orientation and the law, but also witnessed the creation and the rapid evolution of the field itself. The chronology is instructive. The Stonewall Riots took place in 1969, Professor Sherman graduated from Harvard Law School in 1972, and he began teaching law in 1976. Needless to say, much has happened since 1976, and Sherman's impending retirement gives us an opportunity to look back and make some observations about what those thirty-plus years have meant for the legal struggle for sexual orientation equality and for the academic study of that struggle.

To begin with an unsubtle point: much has changed. Not everything, by any means, but many things. Compare some significant aspects of today's legal landscape to the legal picture in 1976. The Supreme Court had not yet weighed in a consequential way on what—if anything—the Constitution meant for gay rights. Neither *Lawrence v. Texas* nor *Romer v. Evans* had yet been decided by the Court in 1976. Indeed, even the movement's biggest loss in that court—the *Bowers v. Hardwick* decision upholding sodomy laws—was 10 years off. Losses in cases involving the St. Patrick's Day parade, the Boy Scouts of America, and the Solomon Amendment were also many years down the road.¹ No state in the country then had an anti-discrimination law covering sexual orientation, while 20 states do today.² Twenty-four states still criminalized consensual sodomy,³ free of the

* William Nelson Cromwell Professor of Law, Stanford Law School. Thanks to Juliet Brodie for comments and conversation about this subject, and to Erin Schanning and Mark Gaber for excellent research assistance.

1. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995).

2. The states are Colo., Conn., D.C., Haw., Ill., Iowa, Me., Md., Mass., Minn., Nev., N.H., N.J., N.M., N.Y., Or., R.I., Vt., Wash., Wis. See Human Rights Campaign, Workplace: Laws, http://www.hrc.org/issues/workplace/workplace_laws.asp (last visited Feb. 3, 2009).

3. The states were Ala., Ariz., Ark., D.C., Fla., Ga., Idaho, Kan., Ky., L.A., Md., Mich., Minn., Miss., Mo., Mont., Nev., N.C., Okla., R.I., S.C., Tenn., Tex., Utah, and Va. Yao Apasu-Gbotsu et al.,

constitutional impediment to doing so that *Lawrence* would later impose. No state, and only about two dozen municipalities, offered even limited domestic partnership benefits,⁴ and the term “civil union” had not yet been invented. Today, nine states, the District of Columbia, and some seventy-eight municipalities offer some form of partnership benefit, ranging from limited to comprehensive.⁵

Perhaps the most striking contrast to today, however, is that same-sex marriage was on no one’s radar in 1976 as a serious possibility. It had been rejected decisively, with no dissent, by three state appellate courts in the early 1970s.⁶ Thirty years later, Massachusetts became the first state to allow same-sex marriage with its landmark *Goodridge* decision in 2003.⁷ In 2008, Connecticut and California courts joined Massachusetts in finding that same-sex couples had a right to wed protected by the state constitution,⁸ although the California ruling was later overturned by a ballot initiative that was challenged in court.⁹ The Iowa Supreme Court followed in 2009.¹⁰ And, in what may come to be regarded as the most significant development of them all, the Vermont legislature became the first state legislature to legalize same-sex marriage in April 2009.¹¹

Focusing on marriage, in particular, sharpens the contrast with the state of affairs in 1976 in ways that go beyond the question of legal rights alone because the marriage struggle today captures much about where the contemporary movement for sexual orientation equality stands. Since the campaign for marriage began in earnest in 1993, with a surprising decision from the Hawaii Supreme Court laying the groundwork for a speedy legalization of same-sex marriage in that state,¹² the quest for the right to marry

Survey on the Law: Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 524 n.9 (1986).

4. See Legal Recognition of Lesbian and Gay Relationships, LESBIANS, GAY MEN AND THE LAW 442 nn.1, 7 (William B. Rubenstein ed., 1993) (stating that “[i]n the last decade [1983–1993, over two dozen municipalities in the United States and Canada . . . have begun to offer . . . domestic partnerships.”).

5. See Human Rights Campaign, City and County Domestic Partner Registries http://www.hrc.org/issues/marriage/domestic_partners/9133.htm (last visited Mar. 16, 2009).

6. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

7. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003).

8. *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008); *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 412 (Conn. 2008).

9. Maura Dolan, *Prop. 8 Gay Marriage Ban Goes to Supreme Court*, L.A. TIMES, Nov. 20, 2008, <http://articles.latimes.com/2008/nov/20/local/me-prop8-supreme-court20>.

10. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

11. Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 8, 2009, at A1.

12. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

has become the LGBT movement's signature issue. Whether measured by quantity of major law-reform litigation, column inches in newspapers, number of ballot measures, or any number of other possible indicia, same-sex marriage has dominated all other gay-rights issue since 1993, and by a wide margin. The decade and a half since the initial Hawaii decision has produced dramatic victories, widespread backlash, and plenty of attention. Given this high profile, it is not surprising that the same-sex marriage issue now rivals abortion as a principal focus of the "culture wars," for it has become a flashpoint for debate not only about sexual orientation, but about gender and normative visions of family life, as well.

For all the fiery rhetoric and deep disagreements dividing opponents and proponents of same-sex marriage, however, there are some surprising points of confluence between the two sides in how they frame the debate. First, both supporters and opponents of same-sex marriage characterize the institution of marriage as a centrally important and positive force in communal life.¹³ Such a characterization is, of course, utterly predictable for those opposing same-sex marriage. For example, the description of marriage as "the foundation of civilization, the seedbed of virtue, and the well-spring of society"¹⁴ comes from a long-time LGBT rights foe, Focus on the Family. Rhetoric of this kind is standard fare on the right and could have been offered up by virtually any proponent of cultural conservatism. Yet it is hardly obvious that prominent supporters of LGBT rights would also have such high praise for marriage. Consider, for example, the description offered by Evan Wolfson, director of Freedom to Marry, former litigator at Lambda Legal Defense Fund, and a high-profile leader in marriage advocacy. He has said that "gay people, like all human beings, love and want to declare love, want inclusion in the community and the equal choices that belong to us as Americans. . . . Marriage equality is the precondition for these rights, these protections, this inclusion, this full citizenship."¹⁵ Similarly, conservative gay activist Andrew Sullivan has called marriage the "highest form of human happiness."¹⁶ And, in *Goodridge*, the Massachusetts Supreme Court deemed marriage a "vital social institution,"¹⁷ calling it "one of our community's most rewarding and cherished institutions."¹⁸

13. This convergence is explored in NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 98–100 (2008).

14. Family Research Council, *Marriage & Family*, <http://www.frc.org/marriage-family> (last visited Feb. 3, 2009).

15. EVAN WOLFSON, *WHY MARRIAGE MATTERS* 18 (2004).

16. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 156 (1995).

17. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

18. *Id.* at 49.

A second point of confluence is that both sides frame the marriage debate as something of an epochal showdown on LGBT equality. Both, in other words, seem to see the stakes as high, the outcome as a proxy statement about LGBT equality, and the struggle as a cultural moment of truth. In his account of the movement for same-sex marriage, historian George Chauncey neatly captures this sentiment:

[T]he history of marriage has given this debate special significance for all sides because the freedom to marry, including the right to choose one's partner in marriage, has come to be regarded as a fundamental civil right and a powerful symbol of full equality and citizenship. Many fundamentalists now strongly oppose the right of gay couples to marry because they see that right as the ultimate symbol of the equality they would deny to gay people Many lesbians and gay men have embraced the campaign for marriage rights because they, too, see marriage equality as a fundamental sign of their equality and full citizenship¹⁹

This improbably-shared framing has lent an aura of inevitability to the controversy about same-sex marriage—as if the debate reflects the natural and inescapable culmination of three decades of struggle over LGBT equality, with access to the most privileged social institution, finally, at stake. In this essay, I call that notion into question by pressing us to remember another debate about same-sex marriage—one that took place within the LGBT community, but has, with a few exceptions, largely receded. This internal debate focused on whether same-sex marriage was a worthy normative priority for the LGBT movement, and it was inspired by the skepticism of LGBT advocates who believed that other values—feminism, sexual liberation, cultural difference, to name a few—ought to have trumped the primacy of marriage advocacy. In some quarters, the views that shaped this opposition still exist, but the ideas have become something to offer alongside same-sex marriage rights, not instead of it. For example, a recent book by Nancy Polikoff, an eloquent, longtime critic of marriage, argues that LGBT and other progressive advocates ought to pursue *both* marriage equality and different forms of legal protections for diversely-configured households.²⁰

The fact that the public debate about same-sex marriage has been

19. GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 165–66 (2004).

20. POLIKOFF, *supra* note 13. To similar general effect, see *Beyond Marriage, Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, (July 26, 2006), http://www.beyondmarriage.org/full_statement.html (a coalition of progressive activists and academics calling for effort to diversify and democratize partnership and household recognition). Polikoff does favor renaming marriage as “civil partnership.” I take up issues relating to forms and names in Part III.A.1.

framed as the true test of LGBT equality undoubtedly has been a prime force in quieting any internal resistance to same-sex marriage. The internal critics have always had political commitments that place them in deep and passionate opposition to the “external” critics of same-sex marriage—the cultural and religious traditionalists who oppose LGBT equality in all its forms. Indeed, the internal and external resistance to same-sex marriage are strikingly converse to one another. The internal resistance to marriage advocacy came from those strongly committed to gay equality, but doubtful about the institution of marriage. The external resistance comes from those strongly opposed to gay equality, but reverent about the traditional institution of marriage.

Although the internal resistance has substantially faded from view, I propose that we revisit it in light of the dramatic developments of the last fifteen years. I do so with three purposes in mind. The first is simply to remember that there was once a robust internal debate about seeking same-sex marriage—a fact, I have learned, that is unknown to many LGBT supporters today. Throughout the seventeen years that I have taught *Sexual Orientation and the Law*, I have noticed that students have become increasingly less familiar with the idea that there *could* be any critique of marriage, and more of them have become dismissive of the idea that there might be legitimate grounds for seeing the marriage issue as anything other than the symbolic equality question that it has come to be in the contemporary political arena. There is, thus, intellectual and historical value in remembering the critique. Second, it is worth reflecting on how the public debate about same-sex marriage might have unfolded differently had the marriage skeptics within the LGBT community prevailed and persuaded the movement to pursue a different path. To this end, I consider, in counterfactual fashion, paths in the road that were *not* taken by LGBT advocates. I sketch out some alternate directions that might have been pursued at various points in the struggle, had the internal critique commanded more support. Third, I consider what the contemporary relevance of the internal critique might be. Here, I suggest that there is a rich set of empirical research questions that have gone largely unexplored by scholars. That we have had several years of experience with same-sex marriage, civil union, and/or domestic partnership in some American states (as well as foreign countries) supplies a factual context that can facilitate new scrutiny and exploration of some of the arguments advanced by marriage skeptics. This scrutiny, in turn, can produce useful insights to guide future advocacy and policy.

In Part I, I offer a brief capsule history of the contemporary movement

for marriage equality, sufficient to provide a context for later discussion. In Part II, I identify the major conceptual strands of internal resistance to same-sex marriage. I use as my focal point an influential 1989 debate between Tom Stoddard and Paula Ettelbrick, both leading advocates of same-sex equality. Their debate proved quite prescient in laying out the normative bases for a pro-LGBT critique of marriage advocacy. In Part III, I look both to the past and future in considering that critique. Looking backward, I consider paths that the movement might have taken had the internal resistance proven more powerful, and the normative priorities and strategic judgments of the LGBT movement been different. Looking forward, I suggest a series of questions that merit empirical study in light of what has developed in the last several years.

I. BRIEF OVERVIEW OF SAME-SEX MARRIAGE AS PUBLIC CONTROVERSY

In this section, I provide a capsule overview of the movement for marriage equality. More comprehensive treatments are available elsewhere;²¹ for our purposes, this thumbnail sketch of the key legal and political chronology should suffice. Although the contemporary movement for marriage rights began in earnest in 1993 with the Hawaii Supreme Court's decision in *Baehr*, it is worth noting that, even before Stonewall, the then-fledgling, gay-oriented Metropolitan Community Church was performing marriage ceremonies for committed couples at the time of its founding in 1968.²² And, some early gay activists sought marriage rights in the 1970s, seeing their claim as a "political act with political implications."²³ Three lawsuits seeking access to same-sex marriage were filed in the early 1970s, but rejected decisively by state appellate courts.²⁴

Contemporary developments began in 1993. Interestingly, the major gay-rights litigation groups that have shaped the movement's law-reform agenda and the legal campaign for same-sex marriage were *not* the ones to launch this modern movement. The issue first shot to prominence with a case that was brought by private counsel because the advocacy groups had declined to litigate it.²⁵ That generative lawsuit led to the Hawaii Supreme

21. See, e.g., WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR WORSE?* 11–31 (2006); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality, Then and Now* 15–26; 36–51 (forthcoming, 82 S. CAL. L. REV. (2009)) (on file with author).

22. CHAUNCEY, *supra* note 19, at 91–92.

23. *Id.* at 90 (quoting Minnesota litigants Baker and McConnell).

24. See *supra* note 6 and accompanying text.

25. See JASON PIERCESON, *COURTS, LIBERALISM AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 107 (2005); David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY AND CIVIL RIGHTS* 293

Court's landmark decision in *Baehr v. Lewin*, calling for the state's traditional marriage law to be subject to strict scrutiny under Hawaii's equal rights amendment.²⁶ The explosive ruling was widely regarded to signal the impending legalization of same-sex marriage, and it galvanized both supporters and opponents around the country almost as soon as it was issued.

In the decade and a half since *Baehr*, there have been dramatic developments both for and against same-sex marriage. The *Baehr* decision itself, portending the legalization of same-sex marriage in that state, never came to fruition because of a 1998 state constitutional amendment banning same-sex marriage unless approved by the state legislature.²⁷ But the decision started a ball rolling that has led to substantial law reforms. Since *Baehr*, the national gay-rights bar has pursued a strategy of litigating marriage under state constitutions, and choosing states regarded as plausible sites for a victory. In four states—Massachusetts, California, Connecticut, and Iowa—the state supreme court has ruled that the state constitution protects the right of same-sex couples to wed.²⁸ The California decision was overturned by a ballot measure in 2008, but that measure was challenged in litigation that is pending as this article goes to press.²⁹ Supreme courts in two other states—Vermont and New Jersey—have ruled that the state constitution requires that same-sex couples be accorded rights and responsibilities equal to marriage,³⁰ but those decisions permitted the state legislature to respond to the ruling by enacting comprehensive civil unions in lieu of opening marriage per se, and that is what the legislatures chose to do.³¹ Legislatures in seven other states have passed some form of domestic partnership or civil union legislation since *Baehr*.³² In 2009, Vermont broke significant new ground when it became the first state to allow same-sex marriage as a matter of legislative policy, and other states followed by considering legislative legalization, as well.³³

While there has been considerable progress in securing rights for same-sex couples, there has also been a series of litigation losses and many

(John D'Emilio, William Turner & Urvashi Vaid eds., 2000).

26. 852 P.2d 44, 63, 68 (Haw. 1993).

27. See PIERCESON, *supra* note 25, at 124–25.

28. *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 412 (Conn. 2008); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948–49 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

29. See Dolan, *supra* note 9.

30. *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

31. N.J. STAT. ANN. § 37:1–28 (West Supp. 2008); VT. STAT. ANN. tit. 15, § 1201 (West 2007).

32. WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* ch. 6 (3d ed. 2008).

33. Abby Goodnough, *Maine Senate Backs Same-Sex Marriage*, N.Y. TIMES, May 1, 2009, at A15.

political defeats. State high courts in Maryland, New York, and Washington have rejected claims of a right to marry asserted by same-sex couples,³⁴ as have appellate courts in Arizona and Indiana.³⁵ The political losses, however, have been more substantial. Indeed, almost as soon as *Baehr* was decided, opponents of same-sex marriage mobilized on the state and national levels. In addition to securing the constitutional amendment in Hawaii that blunted the effect of *Baehr* itself, opponents mobilized nationally and won passage of the federal Defense of Marriage Act (DOMA) in 1996.³⁶ DOMA, signed by Bill Clinton before the 1996 election, codifies a definition of marriage as between one man and one woman for purposes of federal programs, and also provides that states are not required to recognize same-sex marriages performed elsewhere. In addition, between 1996 and 2008, opponents of marriage equality successfully pressed for the enactment of “mini-DOMAs” in over forty states.³⁷ Some of the mini-DOMAs are statutory and others are constitutional: some target marriage alone, and others limit the recognition of same-sex relationships more broadly. Almost every ballot measure that has put a mini-DOMA of some kind before the voters has passed,³⁸ though the victory margins have varied. Proposition 8, enacted in California to amend the state constitution and wipe out a state supreme court decision finding a constitutional right to wed, passed with only 52% of the vote, down from the 61% of voters who supported a statutory mini-DOMA in California in 2000.³⁹ The political and legal developments since *Baehr* have, thus, reflected both dramatic progress and substantial retrenchment for same-sex couples. Notably, over the same time period, public opinion supporting same-sex marriage and civil unions has risen markedly.⁴⁰

34. *Conaway v. Deane*, 932 A.2d 571, 586 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006).

35. *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

36. 28 U.S.C. § 1738C (2006).

37. Nat'l Gay and Lesbian Taskforce, *Anti-Gay Measures in the U.S.*, http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_11_04_08_CA_AZ_FL.pdf (last visited Mar. 14, 2009).

38. The exception is a 2006 ballot measure in Arizona. Sonya Geis, *New Tactic in Fighting Marriage Initiatives: Opponents Cite Effects on Straight Couples*, WASH. POST, Nov. 20, 2006, at A03.

39. Jesse McKinley & Laurie Goodstein, *Ban in 3 States in Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

40. See, e.g., Jennifer Agiesta and Alec MacGillis, *Poll: Rising U.S. Support for Social Issues, Such as Gay Marriage*, WASHINGTON POST, Apr. 30, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043001640.html>.

II. REMEMBERING THE OPPOSITION FROM WITHIN

The rise of marriage to the top of the LGBT agenda was not inevitable. For one thing, as described earlier, it is striking that a law-reform litigation campaign of this magnitude was started without the blessing or participation of the major gay-rights groups, whose lawyers thought it was premature to press the marriage issue. Nevertheless, once the proverbial genie was out of the bottle, the groups came aboard and have played an active role in molding the marriage movement ever since.

More significantly, the primacy of the marriage issue to the contemporary gay-rights movement was not inevitable because of the political resistance it once faced within the LGBT movement from pro-equality marriage skeptics. The basic ideas that formed the core of the internal skepticism were articulated at an early point in an influential and high-profile debate within the gay community about whether to pursue access to marriage. The debate between the late Tom Stoddard, then the executive director of Lambda Legal Defense Fund, and Paula Ettelbrick, then Lambda's legal director, was published in *Out/Look Magazine* in 1989.⁴¹ It has been widely republished since then in sexual orientation and the law casebooks and other venues.⁴²

At an early point in the exchange, Stoddard and Ettelbrick mapped out the rough parameters of the internal debate, with Stoddard arguing for, and Ettelbrick against, the normative priority of marriage. To a striking degree, the exchange presaged the arguments that would follow. Although Ettelbrick would later refine and elaborate some of her arguments,⁴³ her essay identified in at least rudimentary form the key themes that would later surface among pro-equality marriage skeptics.

Stoddard favored the pursuit of same-sex marriage, invoking practical, political, and philosophical concerns in his argument. First, Stoddard argued that marriage would bring many practical, tangible benefits, and he

41. *Gay Marriage: A Must or a Bust?*, OUT/LOOK, Fall 1989, at 9, 9–17, reprinted in CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 32, at 678–88.

42. For examples of law school casebooks, see WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, SEXUALITY, GENDER AND THE LAW 1098–1101 (2d ed. 2004); RUBENSTEIN ET AL., *supra* note 32, at 678–88. For examples of other academic works, see FAMILIES IN THE UNITED STATES: KINSHIP AND DOMESTIC POLICIES, chs. 35–36 (Karen V. Hansen & Anita Iltis Garey eds., 1998); THE COLUMBIA READER ON LESBIANS AND GAY MEN IN MEDIA, SCIENCE AND POLITICS 633–39 (Larry P. Gross & James D. Woods eds., 1999).

43. Paula L. Ettelbrick, *Domestic Partnerships, Civil Unions or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 905–14 (2001); Paula L. Ettelbrick, *Wedlock Alert: A comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 107–66 (1996); cf. Paula L. Ettelbrick & Julie Shapiro, *Are We on the Path to Liberation Now?: Same-Sex Marriage at Home and Abroad*, 2 SEATTLE J. SOC. JUST. 475–92 (2004) (transcript of dialogue between two authors).

identified the wide array of rights and entitlements that flow, by law or custom, from marriage.⁴⁴ He also argued that contractual arrangements could not adequately replace access to marriage because of doctrinal and financial barriers. His emphasis on the wide sweep of benefits denied to same-sex couples by virtue of withholding marriage rights has become a staple of LGBT marriage advocacy.⁴⁵

Second, Stoddard argued that marriage was the most important political issue for LGBT advocates because it is the one “that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”⁴⁶ Foreshadowing some of the pro-marriage rhetoric that would shape the arguments of the movement many years later—as well as the emergence of marriage as the proxy question for LGBT equality—Stoddard called marriage “the centerpiece of our entire social structure,” something that “inspires sentiments suggesting that is something almost suprahuman.”⁴⁷ His claim that marriage was *sui generis* led him to reject, categorically, the idea that domestic partnership or any other new institution ought to be pursued.⁴⁸ He believed that such institutions could “never assure full equality,” and that “[g]ay relationships will continue to be accorded a subsidiary status until the day that gay couples have *exactly* the same rights as their heterosexual counterparts.”⁴⁹ Once again, Stoddard neatly presaged later arguments by LGBT forces that domestic partnership, or other new legal structures, could offer only “separate but equal” status to same-sex couples.⁵⁰

Finally, Stoddard added a “philosophical” element, claiming that mar-

44. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9, 9–13 reprinted in CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 32, at 679–81.

45. See, e.g., WOLFSON, *supra* note 15, at 4 (characterizing marriage as “the legal gateway to a vast array of protections, responsibilities, and benefits, most of which cannot be replicated in any other way, no matter how much forethought you show or how much you are able to spend on attorneys’ fees and assembling proxies and papers”).

46. Stoddard, *supra* note 44, at 681.

47. *Id.* at 681–82.

48. *Id.* at 682.

49. *Id.*

50. See e.g., WOLFSON, *supra* note 15, at 144 (“Why should we have two lines at the clerk’s office, two sets of rules and unequal solutions? Why should we say to some kids and couples, ‘your families have to come through the back door?’”). The California Supreme Court echoed this theme in its marriage decision:

[R]etaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects ‘second class citizens’.

In re Marriage Cases, 183 P.3d 384, 384–85 (Cal. 2008).

riage should be a choice, not an obligation. He confessed that he might choose not to marry his long-term partner, but argued that same-sex couples ought to be able to make this determination for themselves.⁵¹ In addition to distinguishing between choice and obligation, Stoddard went on to argue that allowing same-sex couples to marry could transform the institution of marriage by eliminating the “gender requirements of marriage” and thereby “divest[] [the institution] of the sexist trappings of the past.”⁵² On this issue, Stoddard returned to the point with which he began his essay: acknowledging that marriage had been “oppressive, especially (although not entirely) to women.”⁵³ Thus, he ultimately staked his claim not on the intrinsic worth of marriage as historically or currently structured, but on the capacity of same-sex couples to change the institution. This point has not been part of the public rhetoric of the contemporary movement for same-sex marriage, but it has been developed by LGBT scholars. Nan Hunter, for example, has argued that same-sex marriage has the capacity to dramatically alter the gender dynamics that shape marriage.⁵⁴

Ettelbrick’s opposition is succinctly captured in the title of her piece, *Since When is Marriage a Path to Liberation?*⁵⁵ She challenged the idea that marriage could be liberating in the senses that matter most.⁵⁶ She drew, in part, on feminist and progressive critiques of family law that had unfolded in the twenty years or so before she wrote. Her analysis can be distilled into three main conceptual claims, each of which later found its place, and was further developed, in the literature of pro-equality marriage skepticism. We can call these claims “anti-assimilationist,” “anti-universalist,” and “functionalist.”

First, Ettelbrick argued that marriage represented uncritical assimilation to dominant norms. Such assimilation, she suggested, would thwart the development of a gay culture that would “push[] the parameters of sex, sexuality, and family.”⁵⁷ Along these lines, she feared that same-sex marriage would lead gays and lesbians to “mimic[] all that is bad about . . . marriage in [their] effort to appear to be the same as straight cou-

51. Stoddard, *supra* note 44, at 682.

52. *Id.* at 683.

53. *Id.* at 679.

54. Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16–19 (1991).

55. Paula L. Ettelbrick, *Since When Is Marriage a Path To Liberation?*, OUT/LOOK, Fall 1989, at 9, 14–17, reprinted in CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, *supra* note 32, at 683.

56. *Id.* at 684, 688.

57. *Id.*

ples.”⁵⁸ And, she argued that marriage advocacy would take the LGBT movement on an ironic path to a different kind of inequality, by stigmatizing “all gay and lesbian sex that is not performed in the marital context.”⁵⁹ In contesting the assimilationism of marriage advocacy, Ettelbrick put forward a vision of what feminist theorists would later call “difference equality,” rather than the “sameness equality” favored by Stoddard. Where Stoddard had argued that equality meant securing for lesbians and gay men “exactly the same rights as their heterosexual counterparts,”⁶⁰ Ettelbrick asserted that “[j]ustice for gay men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships.”⁶¹

This idea of marriage as rank assimilationism became a prominent theme in the literature that followed, and was engaged by writers like Michael Warner, Ruthann Robson, and Katherine Franke.⁶² Warner’s book, *The Trouble with Normal*, is a particularly influential contribution, focusing not only on the argument that same-sex marriage repudiates the possibility of a distinctively queer culture, but also on the idea that extending marriage to same-sex couples would undermine the cause of sexual liberation by creating a new class of sexual outlaws comprised of those engaged in non-marital—or what Franke calls “non-normative”—sex.⁶³ Other theorists have pursued this point as well.⁶⁴ As in Ettelbrick’s essay, this argument is built on the fundamental idea of equality as difference, not sameness.

Ettelbrick’s second principal critique of marriage proceeded from an anti-universalist stance. She asserted that marriage advocacy did not pay sufficient attention to the gender, race, and class dimensions of marriage.⁶⁵ The essay did not unpack these critiques in detail, but identified the basic points. Ettelbrick noted, for example, that marriage has a patriarchal history

58. *Id.* at 685.

59. *Id.*

60. Stoddard, *supra* note 44, at 682.

61. Ettelbrick, *supra* note 55, at 684.

62. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 540 (1990).

63. WARNER, *supra* note 62, at 111–16; Franke, *supra* note 62, at 1415.

64. Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 327–28 (1998); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1569 (2006); Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 607 (2004).

65. Ettelbrick, *supra* note 55, at 686.

and that “[g]ay liberation is inexorably linked to women’s liberation. Each is essential to the other.”⁶⁶ She also argued that same-sex marriage advocacy would advance the interests of the most privileged, while leaving unaddressed the urgent needs of “more marginal members of the lesbian and gay community (women, people of color, working class, and poor).”⁶⁷ The gender, race, and class critique of marriage was elaborated and developed by later writers critical of marriage advocacy. For example, in an early piece, Nitya Duclos argued that “legal marriage is going to help some and hurt some roughly according to existing rank of social power.”⁶⁸ This general line of argument was also pursued by others.⁶⁹ On the issue of gender, many pro-equality marriage skeptics went on to argue that marriage remains an institution that disadvantages women and ought to be challenged on that basis.⁷⁰ On the issues of race and class, Darren Hutchinson has been a principal critic of the failure of same-sex marriage advocacy to grapple with race and class differences in the LGBT community. For example, he has pointed out the lower rates at which gay persons of color marry, as well as the harm done to families headed by single mothers by pro-same-sex marriage rhetoric celebrating the unique virtue of two-parent families.⁷¹

A third idea articulated by Ettelbrick was functional. Arguing that pushing for marriage rights ignores the need to challenge the unjust social and legal privileging of marriage itself, she called for functionally-oriented efforts to “break the tradition of piling benefits and privileges on to those who are married, while ignoring the real life needs of those who are not.”⁷² Marriage advocacy, Ettelbrick suggested, would perniciously blunt the demand for more fundamental social change by accepting the idea that important benefits like access to health care are appropriately linked to marriage.⁷³

This functional idea, too, was developed in subsequent literature, most

66. *Id.* at 684.

67. *Id.* at 686.

68. Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 59 (1991).

69. See, e.g., Foster, *supra* note 64, at 325; Harris, *supra* note 64, at 1569–70; Suffedini & Findley, *supra* note 64, at 607.

70. See, e.g., POLIKOFF, *supra* note 13, at 12, 98; Robson & Valentine, *supra* note 64, at 536–37; cf. Julie Shapiro, *Reflections on Complicity*, 8 N.Y. CITY L. REV. 657, 658, 660–61 (2005) (arguments by a contemporary advocate of same-sex marriage sympathetic to the feminist critique).

71. Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”? : Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1370–71 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 589–90 (1997).

72. Ettelbrick, *supra* note 55, at 687.

73. *Id.*

prominently in a series of articles and a recent book by Nancy Polikoff. Polikoff has long been a leading pro-equality marriage skeptic, and she is one of the few who continues to actively press parts of that case today. Her 2008 book, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, marshals data and case studies to show the policy perversity of protecting marriage only.⁷⁴ Polikoff illustrates the range of relationships that are left vulnerable under a regime that selectively protects marriage alone, and proposes a more functionally-responsive vision of family law to address the needs of diverse families.⁷⁵ A few years before Polikoff's book, a coalition of progressive political activists had published a statement expressing support for an approach of this kind. In *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, the coalition called for efforts to "diversify and democratize partnership and household recognition," and to seek "government support of all of our households."⁷⁶

The 2006 statement and the 2008 publication of Polikoff's book are probably the most salient attempt to revive at least parts of the internal debate. Significantly, however, neither calls for the rejection of same-sex marriage. They emphasize, instead, that advocacy for marriage equality should be paired with a more inclusive policy that acknowledges and addresses the needs of a range of differently-configured family forms.⁷⁷ Shaped in part by the harsh anti-gay backlash, these efforts reflect not so much a critique of marriage per se as a critique of the marriage-only viewpoint, and the hierarchy that such exclusivity entails. Even with this qualified embrace of marriage, however, these efforts are swimming against a powerful political tide in seeking to re-conceptualize the marriage debate.

As part of her functional argument, Ettelbrick argued for the aggressive pursuit of domestic partnership rights.⁷⁸ In her view, an appropriately inclusive vision of domestic partnership ought "not [be] limited to sexual or romantic relationships" but, instead, should "provide[] an important oppor-

74. POLIKOFF, *supra* note 13. For other arguments pursuing this theme, see Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 324–325 (1991); Duclos, *supra* note 68, at 33–34; Zachary A. Kramer, *Exclusionary Equality and the Case for Same-Sex Families: A Reworking of Martha Fineman's Re-visioned Family Law*, 2 SEATTLE J.SOC. JUST. 505, 509–12, 524 (2004).

75. Polikoff draws on the work of Martha Fineman in placing concepts of care and dependency at the center of family law. See Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 173, 176 (2000). On the potential applicability of Fineman to the same sex marriage issue, see Kramer, *supra* note 74, at 506–07.

76. *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, <http://www.beyondmarriage.org/> (last visited Feb. 13, 2009).

77. Polikoff also called for marriage to be renamed "civil partnership." Polikoff, *supra* note 20, at 132–33. On naming issues, see *infra* Part III.A.1.

78. Ettelbrick, *supra* note 55, at 687.

tunity for those who are not related by blood or marriage to claim certain minimal protections.”⁷⁹ She implored her fellow advocates to “keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society’s views of family.”⁸⁰ In a sense, this argument bridges the functionalist and anti-assimilationist aspects of her argument. It calls for functional family structures that meet the relevant range of human needs. But it also explicitly calls for the embrace of new and different institutions, not the mere revision of old ones.

The idea that meaningful equality means shaping new institutions, as opposed to gaining entrance to marriage, took different forms in the literature that developed in the wake of the Stoddard-Ettelbrick debate. Not all approaches have embraced the functional idea that a broad range of relationships, romantic and otherwise, need protection. For example, some have embraced simply the affirmative benefit of the civil union as a marriage substitute, and celebrate the fact that it is “tabula rasa—the lesbian/gay community can imbue it with a meaning unique to [its] own culture and tradition.”⁸¹ Others—like Polikoff—have argued more expansively for the virtues of pluralism, urging a spectrum of options that can be tailored to particular needs and circumstances.⁸² Notwithstanding these differences, however, arguments of this kind all resist what has become an article of faith in the movement for same-sex marriage: the singular cache and equalizing capacity of marriage.

III. IMPLICATIONS: LOOKING BACK AND LOOKING FORWARD

The internal resistance summarized in the previous section has largely receded. To the extent that aspects of it survive, they do so largely at the margins of the noisy public debate between proponents and opponents of same-sex marriage. In this section, I first look back and consider the points at which—and ways in which—the LGBT rights movement might have made different strategic and substantive choices, had the internal critiques exercised greater influence. I then look forward, explaining some contemporary implications of these critiques and suggesting scholarly directions

79. *Id.*

80. *Id.* at 688.

81. Greg Johnson, *Civil Union: A Reappraisal*, 30 VT. L. REV. 891, 906 (2006) (arguing for civil unions either as an alternative that some may affirmatively prefer or as a remedy for legal inequality while same-sex marriage is being sought); cf. Nancy K. Kubasek, Kara Jennings & Shannon T. Browne, *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same Sex Marriages*, 7 LAW & SEXUALITY 55, 78–79, 85 (1997) (arguing on pragmatic grounds).

82. Suffredini & Findley, *supra* note 64, at 616–17; Lisa Duggan, *Holy Matrimony!*, THE NATION, Mar. 15, 2004, at 14, 15–16.

for the future.

A. *Looking Backward*

It is not all that difficult to identify a principal reason that the internal debate has largely faded. Immediately after the 1993 *Baehr* decision, same-sex marriage was targeted fiercely by anti-gay forces and cast as a show-down issue. Once framed as such, and with backlash measures proliferating around the country at a dizzying speed, the option to continue critiquing marriage became distinctly unpalatable to pro-equality marriage skeptics within the LGBT movement. In a piece reflecting on her transition from marriage skeptic to attorney litigating a same-sex marriage case in Washington State, Julie Shapiro observes that “feminist anti-assimilationists” like herself became boxed in once marriage became “the primary battleground between pro-lesbian and gay and anti-lesbian and gay forces” because “[t]o align oneself with the vitriolic forces of anti-lesbian fundamentalism is unthinkable.”⁸³

In light of the widespread anti-gay backlash that has unfolded in the wake of the Hawaii litigation, is it possible to imagine a different response? Were there other viable tactical choices for the LGBT movement in the aftermath of the *Baehr* decision, given the fervent opposition demonstrated by anti-gay marriage groups? We cannot fully know how viable such strategies might have been because of the way events have unfolded. The fact is, marriage was prioritized, the concerns articulated by the internal critics did not carry the day, and the marriage debate took center stage as a referendum on LGBT equality. It bears emphasis, moreover, that LGBT advocates hardly forced marriage on an unwilling constituency. If anything, some measure of the opposite seems to be true. Given the initial reluctance of the major organizations to pursue marriage, it is not unreasonable to conclude that marriage was vigorously sought by segments of the LGBT grassroots.

I would like to sketch out, however, some political paths not taken, and suggest that the LGBT movement had options that would have allowed it to respond differently, while still remaining fiercely dedicated to LGBT equality. As a thought experiment, let us consider two kinds of political options that might have pushed the debate in different directions at key points: positively embracing one or more new institutions to protect same-

83. Shapiro, *supra* note 70, at 657–58, 665. Responding to similar political dynamics, Nancy Polikoff in her book makes the point that her critique of protecting marriage only should not obscure the fact that “[w]hen Evan Wolfson debates [same sex marriage opponent] David Blankenhorn, there is no question about which side I support.” POLIKOFF, *supra* note 13, at 209.

sex couples; or calling for the elimination of secular marriage altogether.

1. The Positive Embrace of Difference

One imaginable path for the LGBT movement would have been to seek, deliberately, new institutional structures for protecting those in same-sex relationships (and, perhaps, those in other relationships in need of legal protection, as well). In other words, the political strategy for protecting same-sex couples might have been to pursue and embrace difference as a positive and chosen value, rather than to characterize alternative structures as an insulting second-best that codified LGBT exclusion. This effort would have provided a way to demand justice for same-sex couples, while avoiding the assimilationist aspects of marriage. At various points in the debate, in other words, the LGBT movement might have chosen to seek out, embrace, own, and try to shape one or more new legal institutions.

First, before *Baehr* was ever decided, a few dozen municipalities had domestic partnership ordinances. Recall that these were alluded to by both Stoddard and Ettelbrick in their debate. Thus, at an early point, LGBT political forces might have chosen to set their sights on some version of domestic partnership, expand it to the state and/or federal level, and put its energies into deciding who should be protected (same-sex couples only or opposite sex couples as well? Romantically-attached couples only or other relationships in need of legal protection?). This course might have been charted before or after *Baehr*.

A second opportunity arose a few years after *Baehr*, in 1998. When Hawaii amended its constitution to ban same-sex marriage without legislative approval, it codified “reciprocal beneficiaries,” a legal status available to any two unmarried adults, whether in a committed romantic relationship or not.⁸⁴ The reciprocal beneficiaries law created a conspicuous opportunity to pursue not only the anti-assimilationist strand of the internal critique, but the anti-universalist and functionalist aspects, as well. The new Hawaii legal mechanism created the opportunity for progressive, coalition-oriented politics because it afforded legal protection not only to committed same-sex couples, but also to other pairs of adults who are legally barred from marrying, such as a widow and her adult son, two elderly siblings, or two other adults living in a kinship structure of some sort. The enactment of this law might, thus, have marked a moment to rally around a new legal status to be inscribed with the sort of broad, egalitarian values articulated by Ettelbrick, Polikoff, and others. That did not happen, however; instead,

84. HAW. REV. STAT. ANN. § 572C-4 (West 2008).

the statute largely faded from view and is more likely seen (if seen at all) as a half-measure enacted to mollify the disappointed supporters of same-sex marriage than as the beginning of a bold new policy path.

Finally, after the Vermont Supreme Court decided *Baker* in 1999, and the civil union was born as a legislatively-designed, comprehensive marriage substitute in 2000, same-sex couples had another opportunity to seize the mantle of change and make it the community's own. The creation of civil unions, in fact, was greeted with great joy by LGBT citizens around the country and with equally intense alarm by anti-gay forces.⁸⁵ A civil union is more of a marriage substitute than the reciprocal beneficiaries law, so it is less responsive to the functional issues. Still, one can imagine an energetic, national political campaign for civil unions, and a strategy that celebrated their distinctiveness, rather than decried their intrinsic inequality.⁸⁶

Gay-rights advocates have generally rejected the course of civil unions, based on the idea that difference means disadvantage. On this view, the exclusion of same-sex couples from marriage necessarily imposes a mark of stigma. This objection has strong force if one focuses principally on the extant cultural meaning of marriage, and the familiarity and recognition it enjoys. It is forceful, as well, if one adopts the idea that marriage is normatively central to social life. And it is forceful if access to marriage is specifically and uniquely sought by LGBT advocates, and then expressly denied—as it has been in many states in the country. Once all those pieces fall into place, the claim of “separate but equal” lodged by gay-rights advocates against marriage substitutes becomes quite powerful. But there is a path dependency to the foothold this framing ultimately gained. Had other values trumped the commitment to marriage per se—values like cultural distinctiveness and/or a robust commitment to new, egalitarian social institutions—the script might have been written differently. Once marriage and marriage alone was identified as the sole outcome consistent with constitutional equality, however, the rest of the political narrative was firmly established.

Thinking in terms of path dependency poses a hard question: can we really imagine navigating around the “separate but equal” problem as a matter of political advocacy? The deeper question is whether social groups, especially historically subordinated ones, can shape the social meaning of

85. See generally WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNION AND THE FUTURE OF GAY RIGHTS* 43–82 (2002); cf. Johnson, *supra* note 81, at 892.

86. See Johnson, *supra* note 81, at 908.

their own choices and struggles.⁸⁷ A skeptic about the ability of social groups to do so might argue that casting the issue of marriage-alternatives in terms of the strategic and rhetorical choices made by the LGBT movement is simply a noxious modern-day equivalent of the majority opinion's flippant claim in *Plessy v. Ferguson*.⁸⁸ *Plessy* infamously characterized the idea that "enforced separation of the two races stamps the colored race with a badge of inferiority" as true "solely because the colored race chooses to put that construction upon it."⁸⁹ It is possible, in other words, that no matter how enthusiastically LGBT advocates embraced the chance to define their own institution, the social meaning of an alternative legal status would never be understood as anything more than second-class. On the other hand, it is plausible that the received understanding of alternatives to marriage might have evolved differently had the LGBT movement itself eschewed praise of marriage, and instead unapologetically sought out a new institution, not as marriage manqué, but as a way to create a new social form that recognizes the distinctive cultural experience of same-sex couples. In the end, the question eludes a sure answer. It inevitably calls for speculative judgments and has the characteristic difficulties of counterfactual inquiry. What is most significant, perhaps, is that the possible virtues of embracing, rather than condemning, difference were not seriously considered.

A related, yet conceptually distinct, tactic that the LGBT community might have pursued would have been to appropriate for itself the prerogative of naming civil unions "marriages" as an informal matter.⁹⁰ That is, the legal name need not necessarily have overlapped with the social practice of naming civil unions or domestic partnerships. After all, long before any state allowed same-sex marriage, same-sex couples had (and exercised) the option to hold what they called weddings, wear wedding bands, refer to partners as "husbands," "wives," or "spouses," and call themselves married. Declining to cede naming rights to the state might have been another potential tactic for trying to contest and shape social meaning. Such a practice, however, would have been far more instrumental and limited in its aspirations, and far less ideologically coherent, than the choice described

87. On the role of social movements in trying to shape new social meanings and constitutional understandings, see generally Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1558–63 (2004).

88. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

89. *Id.* at 551.

90. The New Jersey Supreme Court alluded to this idea when it said that, "[h]owever the Legislature may act, same-sex couples will be free to call their relationships by the name they choose..." *Lewis v. Harris*, 908 A. 2d 196, 223 (N.J. 2006).

above to seek and affirmatively celebrate one or more separate institutions. The inevitable effect of a rhetorical strategy designed to blur the line between marriage and civil unions would, after all, have been to reinforce the centrality of marriage itself.

2. Calling for the Elimination of Marriage

A different possibility would have been to establish as a central aim the elimination of secular marriage altogether, leaving marriage rules to be adopted and enforced only by religious institutions, and a single, new civil status to be accorded all committed relationships. Unlike the positive embrace of difference described above, this approach would have satisfied the demands of a sameness-based approach to equality, yet not involved the gay-rights movement in marriage advocacy. This approach could have been taken at an early point, or advanced later, as a response to the calls for exclusion of same-sex couples that have driven the backlash.

The virtues of an approach like this have been argued by a diverse set of commentators. Many have made a libertarian or liberal case, focused on the ability of contracts to structure the relationship between couples as they see fit, the virtues of state even-handedness as between gay and straight couples, and the desirable autonomy of religions to set their own rules about who may marry.⁹¹ Some proposals of this kind reject the stark privatization of marriage through contract and argue for recognition of gender-neutral civil unions instead.⁹² A different proposal for abolishing marriage has been made by feminist scholar Martha Fineman, who rejects the premises of libertarianism and argues that the state should subsidize and provide benefits to caretaker-dependent relationships, rather than to married couples.⁹³ If the main purpose of marriage is to provide for children, Fineman argues, that ought to be done explicitly and by design, rather than through the indirect vehicle of marriage.⁹⁴ Some sexual orientation scholars have argued the virtues of Fineman's general approach, while offering modifica-

91. See, e.g., Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); David Boaz, *Privatize Marriage*, SLATE, Apr. 25, 1997, <http://slate.com/id/2440/>; Michael Kinsley, *Abolish Marriage*, SLATE, July 2, 2003, <http://www.slate.com/id/2085127/>.

92. See, e.g., Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15; Mary Lyndon Shanley & Linda McClain, *Should States Abolish Marriage?*, LEGAL AFFAIRS, May, 16, 2005, http://www.legalaffairs.org/webexclusive/debate-club_m0505.msp.

93. Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS 29, 30 (Anita Bernstein ed., 2006). Along similar lines, see Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS, *supra* at 70, 75.

94. Fineman, *supra* note 93, at 40.

tions to more consciously and directly address the needs of same-sex couples.⁹⁵

Whatever the theoretical virtues of the abolish-marriage approach, it has presumably been viewed as a political non-starter. Given prevailing cultural sentimentality about marriage, there is little to suggest any public appetite to abolish it. A bill making a proposal to abolish marriage was recently introduced in Maryland,⁹⁶ for example, but there are no signs of any momentum or movement in that direction, nor am I aware of any evidence that it was ever considered seriously by the LGBT movement. One wonders whether support might have grown—slowly, over time—for a proposal of this sort. It could have defused the contentious debate over same-sex marriage, while providing equal treatment by the state to all couples. It would have respected religious autonomy, with those religious entities fervently attached to the traditional definition of marriage free to follow it by excluding same-sex couples, and other, more progressive religious institutions able to embrace and bless same-sex marriages, as many now do. And it might have encouraged the development of more functionally-responsive family law by challenging the singularity of marriage qua marriage. Still, it is possible that anti-gay forces would have responded by excoriating the LGBT movement for “killing” civil marriage. As things now stand, in any event, it represents only another path in the road that the LGBT movement might have taken, but did not.

B. Looking Forward

Having looked to the past, let us now look to the present and future. Is the internal critique of marriage a historic relic only? Or are there contemporary implications? I would like to suggest that there are, in fact, such implications, and that empirical research can play a key role in bringing those implications into focus.

In considering potential issues of contemporary relevance, let us return to the foundational Stoddard-Ettelbrick debate. Recall that this debate took place twenty years ago, in 1989. The landscape has changed dramatically since then. Reciprocal beneficiaries have been legally protected in Hawaii for ten years. Civil unions have been available in Vermont for nine years, and in other states for several years. Marriage has been legal in Massachusetts for five years, was legal in California for several months in

95. See generally Kramer, *supra* note 74; Polikoff, *supra* note 75.

96. Lisa Rein, *Bill Would End Civil Marriage, Create Domestic Partnerships*, WASH. POST, Feb. 5, 2008, at B4.

2008, is now legal in Connecticut and Iowa, and will soon be legal in Vermont. Same-sex marriage is also legal in seven other countries,⁹⁷ while some form of partnership recognition is available in approximately twenty others.⁹⁸

These developments open up new and intriguing research possibilities. Whereas the questions debated by Stoddard and Ettelbrick were largely abstract and hypothetical, we now have some empirical evidence on which to draw in examining the claims that animated their exchange.⁹⁹ There are, in fact, a host of questions that might shed light on the internal critique of marriage and suggest directions for future political advocacy. Let me suggest a few such questions.

First, consider the debate between feminist skeptics and feminist supporters of marriage about whether opening marriage to same-sex couples would change the institution and its gender dynamics. Interviews with same-sex couples married in the American states that allow it, or in other countries, would provide a basis for going beyond generalized and theoretical claims, and for beginning to assess the ways in which these couples are structuring their marital relationships.

Indeed, Vicki Schultz and Michael Yarbrough have undertaken some research along precisely these lines.¹⁰⁰ They note that past empirical studies of same-sex couples have shown them to be more egalitarian than their heterosexual counterparts in the division of labor within their relationships.¹⁰¹ As well, Schultz and Yarbrough note research showing that heterosexual married couples have been traditionally less egalitarian in this respect than heterosexual cohabiters.¹⁰² They explore various theoretical approaches that might explain what about marriage (versus cohabitation) seems to encourage an unequal allocation of household labor.¹⁰³ Work like theirs offers a framework for thinking about same-sex marriage, gender

97. The countries are Nepal, Norway, Canada, Belgium, Spain, the Netherlands, and South Africa. See Achal Narayanan, *Nepal's Supreme Court OKs Same-Sex Marriage*, PEW FORUM ON RELIGION & PUBLIC LIFE, Nov. 21, 2008, <http://pewforum.org/news/display.php?NewsID=17001>.

98. Meraiah Foley, *Australian Legislators Back Gay Rights*, N.Y. TIMES, Nov. 26, 2008, <http://www.nytimes.com/2008/11/26/world/asia/26australia.html>.

99. Ettelbrick herself recognized this in criticizing as unduly narrow a decision by the University of Vermont to withhold domestic partnership benefits from any couple that did not enter a civil union, once such marriage-like unions had been authorized in that state. Ettelbrick, *One Size*, *supra* note 43, at 913–14 (“No longer is my decade-old concern on this point purely theoretical!”).

100. Powerpoint Presentation, Vicki Schultz & Michael Yarbrough, *Will Marriage Make Gay and Lesbian Couples Less Egalitarian? Assessing the Likely Impact of Marriage on the Division of Household Labor in Same-Sex Couples* (Jan. 2007) (on file with author).

101. *Id.*

102. *Id.*

103. *Id.*

roles and how the social or legal dynamics of marriage might push same-sex couples to a less egalitarian division of household labor. This would seem a promising context for empirical research that tracks and follows how same-sex couples who marry organize their relationships.

Second, how many same-sex couples who are legally able to marry choose to do so? If significant numbers do not choose to marry, what explanations do they give for their choice? Is there, in fact, a strain of anti-assimilationism among same-sex couples? If so, is there any generational effect? Where same-sex marriage is available, moreover, how do the statistics about its usage break down in terms of race, class, or other demographic factors? Have arguments that same-sex marriage would disproportionately be used by more socially advantaged couples proven to be correct?

Surveys and interviews should help to elucidate which couples choose to marry, and why. This inquiry, moreover, would have another layer in the case of couples who have the choice to marry *or* to enter a civil union/domestic partnership. For example, some 109,000 same-sex couples are thought to live in California (based on census data),¹⁰⁴ yet estimates are that a far smaller number--18,000--married when they could do so.¹⁰⁵ What can we learn about the many couples who did not marry? What drove their choice? Some may not have wanted to formalize their commitment at all. Others may have affirmatively preferred domestic partnership to marriage. Still others may not have wanted to marry with the looming threat of Proposition 8 hanging over their heads, given its potential to either reverse pre-Proposition 8 marriages retroactively or to create subcategories of same-sex couples, with some married and others barred from doing so. If research along these lines were to show a substantial percentage of same-sex couples simply eschewing marriage, it would suggest that there is more internal resistance in the LGBT community than is readily apparent.

Moreover, if research suggests that a substantial percentage of same-sex couples would prefer a civil union or domestic partnership to marriage, that finding would suggest the virtue of preserving non-marital options, even where marriage is made available to same-sex couples.¹⁰⁶ Notably, the preservation of a diverse set of affiliative options does not appear to be

104. Jesse McKinley, *Gay Couples Rush to the Altar in California Ahead of November Vote*, N.Y. TIMES, Oct. 8, 2008, at A17, available at <http://www.nytimes.com/2008/10/08/us/08gay.html>.

105. Bob Egelko, *Legal Challenges: Same-Sex Marriage Issue Back in High Court*, S.F. CHRON., Nov. 6, 2008, at A19, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/05/BA3B13UM63.DTL>.

106. On the issue of preserving alternative sources of protection, see POLIKOFF, *supra* note 13, at 108; Ettelbrick, *One Size*, *supra* note 43, at 912; Polikoff, *supra* note 75, at 175–76.

consistent with the current political trajectory. The legalization of marriage in both Connecticut and Vermont, for example, has brought with it the legislative elimination of civil unions.¹⁰⁷ Such a standardization of the protection of same-sex relationships belies the claims of many equality advocates that marriage should be only one “choice,” but it has, thus far, proceeded without much notice or protest. This development poses normative questions that give stark contemporary relevance to the internal critique of marriage.

Finally, there are a host of questions about marriage alternatives that would provide insights into how they are functioning. For example, reciprocal beneficiary status is a particularly expansive and flexible form of protection. Who is using it where it is available, and to what extent has it helped meet a range of social needs? Research on this point would provide some empirical insight into the functional critique made by Ettelbrick, and developed at length by Polikoff and others. It would, as well, suggest directions for future policymaking. Studying domestic partnerships and civil unions could also prove fruitful. For example, to what extent, and in what particular respects, do same-sex couples in civil unions in New Jersey (where marriage remains unavailable) regard themselves as stigmatized by their inability to marry?

In sum, gathering data about those who inhabit the emerging social category of same-sex couple can generate insights about the various legal categories that are, at least in theory, available to protect and recognize such couples, and can provide guidance about differences between and among these legal categories.

CONCLUSION

The “other” same-sex marriage debate has been obscured by the intense, publicly visible debate between proponents and opponents of same-sex marriage. It is worth remembering the internal critique of same-sex marriage because it was once a vibrant part of the gay-rights movement; because it throws into relief the strategic and political judgments that have led the LGBT movement to where it is today; and because it offers a basis for critically examining same-sex marriage, civil unions, domestic partnerships, reciprocal beneficiary arrangements, and other emerging legal forms. Looking back, then, may suggest how to look forward.

107. Joanna L. Grossman, *The Vermont Legislature, Inventor of the “Civil Union,” Grants Full Marriage Rights to Same-sex Couples: Why It Decided Civil Unions Were Not Sufficient to Ensure Equality*, FINDLAW, April 13, 2009, <http://writ.news.findlaw.com/grossman/20090413.html>; *Gay Marriage Bill*, HARTFORD COURANT, Apr. 24, 2009, at A10.